

1                   UNITED STATES DISTRICT COURT  
2                   EASTERN DISTRICT OF VIRGINIA  
3                   ALEXANDRIA DIVISION

4                   ROBERT UPDEGROVE, *ET AL.*                 )  
5                   VS.    )  
6    )  
7                   MARK R. HERRING, *ET AL.*                 )  
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14                   TRANSCRIPT OF MOTION HEARING  
15                   BEFORE THE HONORABLE CLAUDE M. HILTON  
16                   UNITED STATES DISTRICT JUDGE

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24                   Proceedings reported by stenotype, transcript produced by  
25                   Julie A. Goodwin.

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1 (JANUARY 15, 2021, 10:02 A.M., OPEN COURT.)

2 THE COURTROOM DEPUTY: Civil Action Number  
3 2020-CV-1141, *Robert Updegrove, et al. versus Mark R. Herring,*  
4 *et al.*

5 If counsel would please note their appearance for  
6 the record.

7 MS. SAMUELS: Good morning, Your Honor. Jessica  
8 Samuels for the Commonwealth defendants. With me at counsel  
9 table is also Mr. Toby Heytens.

10 THE COURT: All right. Good morning.

11 MR. WIDMALM-DELPHONSE: Good morning, Your Honor.  
12 Johannes Widmalm-Delphonse on behalf of Bob Updegrove and Bob  
13 Updegrove Photography, together with Jonathan Scruggs and  
14 Charles Douglas Welty.

15 THE COURT: All right. Good morning.

16 All right. This comes on on your motion. And if  
17 you want to take your mask off while you're talking, you're  
18 welcome to.

19 MS. SAMUELS: Thank you, Your Honor. Good morning.

20 We are here this morning on two motions, both of  
21 which implicate the same question, whether the First Amendment  
22 prohibits the Commonwealth of Virginia through its elected  
23 leaders from expanding protections against discrimination and  
24 public life to members of the LGBT community. The answer to  
25 that question is no, and the complaint should therefore be

1 dismissed.

2           In this suit, plaintiff challenges the Virginia  
3 Values Act, a law adopted by the general assembly last year  
4 that makes our Commonwealth a more equal and inclusive place.  
5 While the impact of the Virginia Values Act is significant, the  
6 basic premise of the law is no different than the scores of  
7 other anti-discrimination laws that have been adopted at the  
8 state and federal levels for over a century, such as Title VII  
9 in the Americans with Disabilities Act. Like these other laws,  
10 the Virginia Values Act makes it unlawful to discriminate on  
11 the basis of certain protected characteristics. One of those  
12 protected characteristics is sexual orientation.

13           The general assembly had ample reason to include  
14 sexual orientation in the Virginia Values Act. As many courts  
15 have noted, anti-LGBT discrimination has long been a feature of  
16 our society, and despite progress in recent decades, that  
17 discrimination still persists today.

18           The legislative determination that no Virginian  
19 should be denied service on account of sexual orientation is  
20 consistent with Justice Kennedy's observation for a majority of  
21 the Supreme Court over two years ago, that, quote, our society  
22 has come to the recognition that gay persons and gay couples  
23 cannot be treated as social outcasts or as inferior in dignity  
24 and worth.

25           Also like other anti-discrimination laws, the

1 Virginia Values Act says nothing about what someone must  
2 believe or the views they must espouse. All it does is require  
3 businesses that set up shop and choose to sell their goods or  
4 services to the general public to treat customers equally  
5 regardless of who they are.

6 Nowhere does the law endorse or compel a particular  
7 view or creed. To the contrary, one of its most important  
8 features is that the law applies across the board to all forms  
9 of discrimination and public accommodations. Just as the law  
10 protects the same-sex couple looking for a professional  
11 photographer to document their wedding, it also protects a  
12 devout Christian who wears a cross from being denied service at  
13 a coffee shop or a restaurant merely because of her religious  
14 beliefs. In this way, the Virginia Values Act does not  
15 restrict how a business owner may express his own message.

16 This case is a perfect example. Plaintiff is  
17 completely free to convey his views about same sex marriage  
18 with his own speech, as he did recently in an editorial  
19 published by a national newspaper. These features of the  
20 Virginia Values Act show why courts, including the Supreme  
21 Court, have consistently upheld state authority to enact this  
22 type of anti-discrimination law.

23 Even the cases on which plaintiff relies accept as  
24 uncontroversial the proposition that the government, when a  
25 majority of our elected representatives choose to do so, may

1 prohibit discrimination in public life. These laws date back  
2 to the decades following the Civil War when many states  
3 codified access to public accommodations regardless of race.  
4 These laws were expanded with the Civil Rights Act of 1964  
5 where Congress prohibited discrimination in certain public  
6 accommodations across the country on the basis of race,  
7 religion, or national origin. And this threat continues  
8 through today as more than 20 states have enacted public  
9 accommodation laws to include protections for LGBT individuals.

10           Against this historical backdrop, it is  
11 unsurprising that both the plaintiffs' First Amendment claims  
12 fail as a matter of law. But this Court need not even reach  
13 those questions on the merits to rule in defendants' favor  
14 because plaintiffs' claims do not satisfy Article III's case or  
15 controversy requirement. This argument under Rule 12(b)(1) is  
16 itself dispositive of both motions, and indeed the entire case.  
17 So before we turn to the merits, I would like to emphasize two  
18 points on the question of justiciability.

19           First, there is no dispute that the Virginia Values  
20 Act has not been enforced against the plaintiff. That means  
21 there is also no dispute that this case is a pre-enforcement  
22 challenge. Under the test outlined by the Supreme Court in  
23 *Susan B. Anthony List* and applied by the Fourth Circuit in  
24 *Abbott*, this court lacks jurisdiction unless plaintiff can show  
25 a credible threat of enforcement.

1                 Based on the complaint and the record presented  
2 here, plaintiff has failed to carry that burden. He does not  
3 assert that he has ever been approached by a same-sex couple  
4 seeking his photography services for their wedding, nor does he  
5 give any reason to think he might face such a request in the  
6 near future.

7                 Plaintiff has also not offered any evidence to  
8 substantiate a credible fear that the law will be enforced  
9 against him and his business specifically, much less that any  
10 such enforcement action would necessarily be imminent.

11 Instead, plaintiff points to evidence that has nothing to do  
12 with Virginia, nothing to do with this law, or nothing to do  
13 with this agency's administrative proceedings.

14                 By comparison, many of the cases on which plaintiff  
15 relies involved a history of past enforcement action against  
16 the very plaintiffs themselves, as in *Susan B. Anthony List* and  
17 *Kenny*. Even in the *North Carolina Right to Life* case, that  
18 plaintiff had been engaged in a back and forth with the state  
19 enforcement agency. We have nothing similar here.

20                 Second, while the standard may seem rigid in some  
21 respects, it is not just a technical pleading rule. From a  
22 practical perspective, the requirements of standing in ripeness  
23 ensure that the Court has the facts necessary to adjudicate a  
24 concrete dispute. Without those facts, such as who approached  
25 the plaintiff, what was requested, whether plaintiff provides

1 similar services to others, and why the customers were denied,  
2 we are left with only hypotheticals and abstract questions  
3 about what may or may not come to pass.

4 That is not the stuff of a case or controversy  
5 under Article III and for good reason. This Court is not  
6 presented with any real world facts on which to base its  
7 decision. From a constitutional perspective, and perhaps most  
8 importantly, these doctrinal requirements go to fundamental  
9 questions about judicial authority and separation of powers.

10 Without a specific factual scenario before the  
11 Court, plaintiff in effect asks for a ruling that outlines in  
12 advance when and in what circumstances in the future plaintiff  
13 would have a right to violate the law. That is exactly the  
14 kind of advisory opinion that Article III does not permit, and  
15 for that reason alone this case should be dismissed.

16 Turning to the merits, I'll take each claim in  
17 turn.

18 On the free speech claim, first, it is helpful to  
19 take a step back and focus on what it is this law actually  
20 does. The text of the statute is really quite simple. Under  
21 code section 2.2-3904, any business that offers or holds out to  
22 the general public goods or services may not refuse or deny  
23 those goods or services to an individual on the basis of  
24 several protected characteristics, including sexual  
25 orientation. This provision is primarily directed at conduct.

1           All it says is that public accommodations may not  
2 refuse to serve certain customers for discriminatory reasons.  
3 And the First Amendment has never applied to grant a blanket  
4 exemption from government regulation to businesses that rely on  
5 creative or artistic skill to create the products they sell.  
6 To follow plaintiffs' logic would lead -- would leave a broad  
7 swath of the commercial marketplace free to discriminate  
8 however they see fit.

9           Nothing about this provision drags plaintiff or his  
10 business into the public's sphere, nor does it require him to  
11 take photos in a certain way or affirmatively offer particular  
12 services. All the law requires is equal treatment among the  
13 services plaintiff chooses to provide. Whatever is offered to  
14 some must be offered to all.

15          That is why contrary to plaintiffs' arguments, this  
16 is not a compelled speech case. The state is not forcing  
17 plaintiff to say anything, the way the students in *Barnette*  
18 were forced to say a pledge and salute the flag.

19          That is also why plaintiffs' comparison to  
20 newspaper and free press cases falls flat. Making it unlawful  
21 to deny service at a hotel or a florist for a discriminatory  
22 reason, simply not the same as telling a newspaper what it must  
23 print.

24          The way the law works also shows why it is not  
25 based on viewpoint. Under section 2.2-3904, it does not matter

1 what a business owner believes or does not believe about  
2 religion, morals, politics, or anything else. Whatever the  
3 owner's motivation, he may not discriminate against customers  
4 on the basis of protected characteristics, no matter the  
5 reasoning behind that decision.

6 Second, on the free speech claim, despite  
7 plaintiffs' insistence to the contrary, the Supreme Court's  
8 decision in *Hurley* is not on point. That case arose from  
9 Massachusetts public accommodation law being applied in what  
10 the Court called a peculiar way, which had the effect of  
11 declaring the parade organizer's speech itself to be the public  
12 accommodation. The Court explained that it was this particular  
13 interpretation of the state law that drove the outcome of the  
14 case, and that is why *Hurley* is the exception and not the rule.

15 We also know that *Hurley* does not control, because  
16 if it did, the *Rumsfeld v. FAIR* case would have come out the  
17 other way and that would have been the end of the matter in  
18 *Masterpiece Cakeshop*. If *Hurley* meant, as plaintiff contends,  
19 that public accommodation laws may not constitutionally be  
20 applied where potentially expressive activity is involved, then  
21 the underlying law in *Masterpiece* would have been invalid and  
22 the Court would have had no reason to examine the statements  
23 from the enforcement proceedings there that ultimately decided  
24 that case.

25 For all of these reasons, *Hurley* does not win this

1 case for plaintiff. Instead, cases like *Jaycees, FAIR, and*  
2 *Pittsburgh Press*, all of which upheld anti-discrimination rules  
3 against First Amendment challenges, should guide this Court's  
4 analysis.

5                 Turning next to the religion claim, the Supreme  
6 Court's decision in *Employment Division versus Smith* is binding  
7 and it is dispositive. Under *Smith*, which remains the law of  
8 the land, unless and until it is overturned by the Supreme  
9 Court, a law that is neutral and generally applicable does not  
10 raise any problem under the First Amendment even if that law  
11 may have the incidental effect of burdening certain religious  
12 practices.

13                 Section 2.2-3904 meets both of these requirements.  
14 It is neutral because it does not single out or target only  
15 religious conduct for regulation. Instead, the broad  
16 nondiscrimination rule applies uniformly to all places of  
17 public accommodation.

18                 The law is also generally applicable for the same  
19 reason the law is not based on viewpoint. The state has  
20 pursued its interest in rooting out discrimination without  
21 regard to whether that conduct is or is not motivated by  
22 religious belief. Plaintiffs' other arguments on the religion  
23 claim are either inconsistent with *Smith* or based on theories  
24 that have not been recognized in this circuit and fail for  
25 those reasons as well.

1               Finally, even if you disagree with us on either  
2 claim on the merits, the result is not that the law must fall.  
3 All it means is that strict scrutiny applies. And even though  
4 this may be a high bar, the Virginia Values Act clears it. The  
5 Supreme Court has already held in the Jaycees case that  
6 eliminating discrimination in public accommodations is a public  
7 interest of the highest order. That is the same interest here,  
8 and it is no less compelling.

9               The law is also narrowly tailored to achieve that  
10 interest. To carve out a patchwork of exemptions, as plaintiff  
11 proposes, would undermine the goal at the heart of this law to  
12 ensure that no one is refused service or turned away because of  
13 who they are. Where, as here, the state's interest is to  
14 prohibit all discrimination, not just some. Allowing  
15 discrimination to exist in certain circumstances frustrates  
16 rather than furthers that interest.

17               Your Honor, I have a few points to make on the  
18 preliminary injunction motion as well. Would you like me to  
19 wrap up with those now or wait till after?

20               THE COURT: You can go ahead.

21               MS. SAMUELS: Okay.

22               I'll wrap up by noting that if the Court were to  
23 deny our motion to dismiss, plaintiffs still would not be  
24 entitled to the preliminary injunction they seek. For all of  
25 the reasons I've already discussed, plaintiff has failed to

1 show a likelihood of success on the merits, as would be  
2 necessary for this Court to enter an injunction.

3                 In addition to that, though, for this Court to  
4 grant such an extraordinary remedy, it is plaintiffs' burden to  
5 prove the other injunction factors as well. Even if the Court  
6 decides that plaintiff has done enough to plead a justiciable  
7 case in controversy and even if this Court accepts plaintiffs'  
8 legal arguments on the merits, plaintiff has still failed to  
9 carry his burden as a factual matter under the second winter  
10 factor, which is likelihood of irreparable harm.

11                 The record before this Court does not prove that  
12 the plaintiff is likely to face any harm, much less harm that  
13 is irreparable in nature. For one thing, the law has not been  
14 enforced against the plaintiff, and plaintiff has offered no  
15 evidence to show a credible fear that it will be.

16                 There is also no evidence that plaintiff has ever  
17 been approached by a same-sex couple seeking photography  
18 services for their wedding, nor is there anything in the record  
19 that would support the inference that a same-sex couple will  
20 request plaintiffs' services anytime soon. If this situation  
21 plaintiff hypothesizes never comes to be, it is hard to  
22 understand how he is currently experiencing irreparable harm.

23                 Without any record evidence showing that  
24 irreparable harm is likely in the absence of an injunction,  
25 plaintiff has failed to carry his burden in seeking that

1 affirmative relief. Even if this case is to proceed, this  
2 Court should not on this record take the extraordinary step of  
3 enjoining the law at this stage of the litigation.

4 Thank you for your time this morning, Your Honor.  
5 If there are no questions, we would ask that the Court deny the  
6 preliminary injunction and dismiss the complaint in its  
7 entirety.

8 THE COURT: All right. Thank you.

9 MR. WIDMALM-DELPHONSE: Good morning again, Your  
10 Honor. Again, my name is Johannes Widmalm-Delphonse. I just  
11 want to briefly address standing, and then my colleague,  
12 Mr. Scruggs, will address the merits of our claim for the  
13 motion to dismiss and the preliminary injunction motion.

14 THE COURT: Very well.

15 MR. WIDMALM-DELPHONSE: Thank you, and may it please  
16 the Court, Your Honor.

17 In the pre-enforcement context to show standing,  
18 plaintiff need only establish three things: He intends to  
19 engage in the course of activity arguably effective with a  
20 constitutional interest, that that activity is arguably  
21 prescribed by the law, and that he faces a credible threat of  
22 prosecution for engaging in that activity. And here, the  
23 Commonwealth does not dispute the first two factors, as the  
24 Court need only decide the credible threat of prosecution.

25 Your Honor, there is such a threat here. And the

1 Court can arrive at that conclusion any number of ways, but  
2 really there's just two things that the Court needs to know to  
3 find a credible threat here.

4                 First, in the Fourth Circuit, cases like *North*  
5 *Carolina Right to Life*, *Preston v. Leake*, *Kenny v. Wilson*, a  
6 slew of Fourth Circuit cases have all said that where the text  
7 of a non-moribund statute facially restricts the expressive  
8 activity that a plaintiff wants to engage in, courts simply  
9 presume that there's a credible threat of enforcement.

10               And we have that here. This is a recent statute.  
11 It was passed six months ago. And the plain text of the  
12 statute prohibits Mr. Updegrove from doing any of the things  
13 that he wants to do. He can't post a statement on his website  
14 explaining his religious beliefs about weddings and that he  
15 will only celebrate weddings between one man and one woman  
16 because that would violate the publication clause.

17               He can't ask clients who come to him if they seek  
18 his services to celebrate a wedding that he can't fulfill  
19 consistent with his beliefs because that would violate -- that  
20 would be an attempt to decline services in violation of the  
21 law. He can't adopt the -- his editorial policy or simply have  
22 it be his practice to only celebrate weddings between one man  
23 and a woman and decline to celebrate same-sex weddings because  
24 that would be a pattern or a practice of resistance to the  
25 right to the statute.

1                   So, we have a recent statute that facially  
2 restricts his expressive activity, and there's a presumption  
3 that there's a credible threat of enforcement. And nothing  
4 that the Commonwealth has said here today or in the briefs  
5 rebuts that presumption, which leads to my second point. We  
6 don't need to show that there's past enforcement. We know that  
7 because of cases like *Virginia v. American Booksellers  
Association, Mobil Oil Corporation, Liberty University v. Lew*,  
8 which all allowed challenges to statutes before the statute was  
9 even enacted. And we don't need to show that he's received the  
10 request because he can violate the law right now.

12                  And that's what this case comes down to because in  
13 their briefs, and in court here today, the Commonwealth admits  
14 that the law prohibits Mr. Updegrove from doing the things that  
15 he wants to do, the speech that he wants to engage in. They  
16 concede that -- so, they admit that he can't do those things,  
17 they defend their ability to enforce the law against him in  
18 this way, and they haven't disavowed any intention of  
19 prosecuting him should he do any of the things that he wants to  
20 do.

21                  That's it. That's all the Court needs to find a  
22 live case or controversy, and that puts this case squarely  
23 within precedent, like *Virginia v. American Booksellers  
Association* -- excuse me -- and *Mobil Oil Corporation*.

25                  Mobil -- in *Mobil Oil*, for instance, the

1 Commonwealth made the same argument that they're making here  
2 today. They said, well, if plaintiff can't prove -- or they  
3 can't show how this law would be enforced, so we don't know if  
4 there's a live case or controversy.

5                   And the Fourth Circuit said, no, if you haven't  
6 disavowed, you haven't given us any reason to believe that the  
7 law won't be enforced the way that it's written, and so we're  
8 going to assume that there is a credible threat of enforcement.

9                   And why wouldn't there be? Why wouldn't they  
10 enforce it the way -- the way that the law is written?

11                  They've said in court here today and in their  
12 briefs that they have a compelling interest. They said, even  
13 if the Court applies strict scrutiny, they have a heightened  
14 interest in forcing Mr. Updegrove to celebrate weddings that  
15 violate his beliefs so long as he remains in the wedding  
16 industry and celebrate weddings between one man and one woman.

17                  And, Your Honor, they actually said just the  
18 opposite. If -- if the Commonwealth comes into the courtroom  
19 and attacks the substance or the merits of the plaintiffs'  
20 claim, that's -- that creates the order of a case or  
21 controversy is what the Court -- is what the Fourth Circuit  
22 said in *Mobil Oil*. And again, we have the exact same thing  
23 here today.

24                  So, Your Honor, there is a presumption of credible  
25 threat. The prosecutor -- the prosecution -- I'm sorry -- the

1 Commonwealth hasn't rebutted that presumption, and some  
2 concluding thoughts.

3 I would just remind the Court about what the  
4 practical effects of this are for Mr. Updegrove. He can't post  
5 a statement on his website to be upfront and transparent with  
6 the public about the services that he provides. He can't adopt  
7 his editorial policy. He can't simply have it be his practice  
8 to only celebrate weddings between one man and one woman  
9 consistent with his beliefs, so Mr. Updegrove is in a position  
10 where he simply has to hope that no one comes to him and asks  
11 for a service that he can't fulfill. And if they do, he is in  
12 a position where he has to choose between violating his beliefs  
13 or violating the law, something that no one should be in a  
14 position to have to choose between.

15 And if he violates the law in any of the ways that  
16 I've just talked about, he could face a lawsuit by a private  
17 citizen who feels aggrieved by his actions or the Attorney  
18 General could file their own complaint without waiting for  
19 someone to come to them complaining that Mr. Updegrove wouldn't  
20 celebrate their wedding. And in that lawsuit he could face  
21 fines and fees of up to \$50,000 for a first-time violation and  
22 \$100,000 for a second violation. So, every day that he lacks  
23 clarity about what this law does and how it affects him is --  
24 he's operating under a cloud of uncertainty and risking his  
25 entire business.

1                   Your Honor, I would just conclude by also reminding  
2 the Court that other courts have found standing in cases just  
3 like this one where creative professionals brought  
4 pre-enforcement challenges against public accommodation laws  
5 that threatened to force them -- to compel or restrict their  
6 speech in the wedding context, whether it be the Eighth Circuit  
7 in *Telescope Media Group*, whether it be the Arizona Supreme  
8 Court in *Brush & Nib Studio*, or whether it be the Western  
9 District of Kentucky in *Chelsey Nelson Photography*. All of  
10 those courts found standing in cases just like this one.

11                  So, Your Honor, unless there's any other  
12 question -- unless you have any questions, I will turn over to  
13 Mr. Scruggs to address the merits of our claim.

14                  THE COURT: Very well.

15                  MR. WIDMALM-DELPHONSE: Thank you.

16                  MR. SCRUGGS: Thank you. Good morning, Your Honor,  
17 and may it please the Court. As my colleague noted, my name is  
18 Jonathan Scruggs, and I'll be talking about the merits issues  
19 today.

20                  Your Honor, the motion to dismiss and motion for a  
21 preliminary injunction raised a whole host of interesting  
22 merits issues, and we might be all -- all day here to discuss,  
23 so I want to focus -- and of course I'm happy to answer  
24 questions about any of those things, but I want to focus my  
25 affirmative discussion on the compelled speech issue since it

1 seems to be the topic of major discussion here this morning.

2                 And regarding your -- that matter, Your Honor, I  
3 think there are three important points that the Commonwealth  
4 has not disputed. First, that Mr. Updegrove's photographs are  
5 protected speech; second, that Mr. Updegrove -- Updegrove's  
6 photograph -- weddings photographs convey a message celebrating  
7 the particular wedding and particular marriage being  
8 photographed; and third, that Mr. Updegrove actually creates  
9 himself and exercises editorial control over these photographs.  
10 Your Honor, those points are decisive under the *Hurley* case --  
11 it's been talked about -- and also the *Billups* case that the  
12 Fourth Circuit recently issued just this past year.

13                 As *Hurley* shows, public accommodation laws that --  
14 public accommodation laws cannot compel someone to speak a  
15 message that they disagree with, that violates their beliefs.  
16 And *Billups* shows that although a law that facially -- that a  
17 law that facially regulates business conduct can still regulate  
18 speech as applied.

19                 Well, here, Your Honor, we have protected speech,  
20 as I noted, and although the accommodations clause facially  
21 regulates conduct, the effect of that clause here is still to  
22 force Mr. Updegrove to create speech, create and convey speech,  
23 convey in a message he disagrees with. And, Your Honor, that  
24 means essentially what is going on is unconstitutional  
25 compelled speech, but it's important to stress that this

1 conclusion in no way impedes the Commonwealth's ability to  
2 accomplish any legitimate interest. The Commonwealth can still  
3 stop actual status discrimination by hotels, by restaurants,  
4 and by every other business without forcing Mr. Updegrove to  
5 speak a message he disagrees with.

6 Mr. Updegrove serves clients regardless of their  
7 status, including those in the LGBT community. He just simply  
8 cannot convey certain messages for anyone no matter who has  
9 asked him to do so, whether that be photographs belittling  
10 others, demeaning others, whether that be photographs as we put  
11 in the record of voodoo themed weddings or satanic themed  
12 weddings. Well, that's true for weddings celebrating same-sex  
13 marriages. He won't convey, create photographs celebrating  
14 that message for anyone.

15 In contrast, Your Honor, the Commonwealth's theory  
16 really has no limiting point. It would allow the government to  
17 use anti-discrimination laws to force paid speakers to convey  
18 any message they disagreed with, whether it be Mr. Updegrove  
19 here or even foreseeing an LGBT artist to create artwork  
20 criticizing same-sex marriage, or as the Eighth Circuit noted  
21 that nothing prevents the Commonwealth from making political  
22 belief a protected class and thereby then forcing a democratic  
23 or republican speech writer to create campaign speeches, write  
24 campaign speeches for a candidate that they disagree with.

25 The First Amendment simply doesn't allow that, Your

1 Honor, and for good reason in our pluralistic society. So  
2 those are kind of the general principles. I want to dig a  
3 little bit deeper into *Hurley* and *Billups* and kind of explain  
4 some points in response to my friend's arguments.

5 First, and then second, we'll explain how the Court  
6 should weigh the competing interest in this case. And again, I  
7 think *Hurley* and *Billups* guide that analysis.

8 So first, as has been noted, *Hurley* involved a  
9 public accommodation law. And as my friend correctly quoted,  
10 even though that law facially regulated conduct and facially  
11 was appropriate, that as applied the Court said, you can't  
12 apply public accommodation to speech itself to alter the  
13 expressive content of speech.

14 Well, here, Your Honor, photographs, as I noted,  
15 are protected speech. Photographs are more expressive than a  
16 parade. In a parade, people are marching and walking.

17 Courts have said that photographs are inherently  
18 expressive, so that logic applies here, that because the  
19 accommodations clause is applying to these photographs, to  
20 change their content to change their message from celebrating  
21 an opposite sex wedding to celebrating a same-sex wedding, that  
22 we fall right under the -- the logic of *Hurley*.

23 Now, my -- my friends would argue, well, the law  
24 here doesn't regulate anything. It doesn't regulate what types  
25 of photographs that Mr. Updegrove writes or how he does his

1 photography or anything like that.

2 Well, Your Honor, again, that's true on its face,  
3 but not as applied. If we look at the actual as applied  
4 application, it literally forces Mr. Updegrove to change the  
5 content of his photographs.

6 The same thing could have been said in *Hurley*, Your  
7 Honor. The law in *Hurley* didn't tell the parade organizers  
8 what color of floats to use or didn't tell them what direction  
9 to go in the parade, and not on its face but as applied it  
10 certainly did. It forced them to admit a banner that they  
11 didn't want to admit into the parade and that altered the  
12 expressive content.

13 And it cannot be said, Your Honor, that *Hurley* only  
14 applies to nonprofits. Well, *Hurley* itself said that these  
15 principles of speaker autonomy apply to, quote, business  
16 corporations generally as well as professional publishers,  
17 unquote.

18 Well, Your Honor, that's just what is happening  
19 here. And I think especially -- this is where *Billups* comes  
20 in, which is the Fourth Circuit decision, which helps us,  
21 because *Billups* involved a law that facially regulated business  
22 conduct. It applied to paid tour guides to require a license  
23 for paid tour guides. And the City of Charleston came to court  
24 making the exact same argument that the Commonwealth is making  
25 now that, hey, this law only regulates business conduct, that

1 it only has an incidental burden on speech, that there's no  
2 speech at all being regulated.

3                   But the Fourth Circuit rejected that argument  
4 expressly citing cases like *Holder versus Humeri* --  
5 *Humanitarian Law Project* and said, look, because the law is  
6 regulating an inherently expressive median speaking about the  
7 City of Charleston, that would trigger First Amendment  
8 scrutiny.

9                   Well, Your Honor, I think that logic applies  
10 squarely here, and let me give an example. I think there's  
11 some confusion over how facial versus as applied works out, and  
12 I think a simple example can prove our point.

13                   Let's take a law like a labor law that regulates  
14 child labor, says no child labor by any business. That lie --  
15 that law applies across the board and it can apply to a  
16 business that creates speech, such as a wedding photographer,  
17 and that would be totally fine. But when that law is applied  
18 to the wedding photographer, that law doesn't alter or tell the  
19 photographer in application what photographs that photographer  
20 must create or not create or what content must be put in those  
21 photographs. That law -- law applies across the board and  
22 applies regardless of what photographs the photographer makes  
23 and doesn't affect anything in the photographs.

24                   We can make a stark contrast to the law here as  
25 we've put those pictures in our brief highlighting essentially

1 the difference in how this law plays out when applied to  
2 Mr. Updegrove.

3 A second point that I think highlights why this law  
4 is different is that labor law example. Again, it doesn't --  
5 it applies regardless of what type of photographs the  
6 photography studio wants to create or doesn't want to create.

7 Here, in contrast, Your Honor, the only reason the  
8 law is triggered, the only reason the liability is triggered to  
9 force Mr. Updegrove to create photographs celebrating a  
10 same-sex wedding is because he wants to create and does create  
11 wedding photographs celebrating the opposite sex marriage,  
12 opposite sex wedding.

13 So, you see, the law is triggered by the content.  
14 If Mr. Updegrove, say, stopped all wedding photographs and only  
15 photographed businesses, there would no -- be no obligation  
16 under the law to create photographs celebrating the same-sex  
17 marriage. It's only because he creates photographs celebrating  
18 an opposite sex marriage that the law is triggered and applied.  
19 And that brings, again, the case straightly under principles  
20 like *Billups* and *Holder*.

21 It's important to stress, Your Honor -- and these  
22 principles are not new. The U.S. Supreme Court has applied  
23 this logic consistently for the past 80 years. There have been  
24 numerous Supreme Court cases that involve laws regulating  
25 conduct, but the Supreme Court strikes down their application

1 as applied when they apply to speech.

2 One of the first First Amendment cases, Your Honor,  
3 *Cantwell versus Connecticut*, was that logic. It involved a  
4 breach of the peace statute, or probably maybe more famously  
5 *Cohen versus California*. It involved a breach of the peace  
6 statute that regulated conduct on its face, but the Court  
7 applied strict scrutiny because in that situation it was  
8 applied. It was triggered by the expressive content of the  
9 jacket.

10 So, respectfully, Your Honor, the Commonwealth's  
11 position runs in conflict with all these cases that date back  
12 not just in the Fourth Circuit, but the U.S. Supreme Court for  
13 a while.

14 So, I think we see *Hurley* and *Billups* provide a  
15 fair amount of guidance here and explains what they apply, and  
16 that's exactly why we have cases that we've cited outside the  
17 circuit like the Eighth Circuit *Telescope Media* case; the  
18 Arizona Supreme Court, the Russian dip (phonetic) case; the  
19 recent photographer case out of the Western District of  
20 Kentucky. All these cases apply this logic from *Hurley* and  
21 *Holder versus Humanitarian Law Project* and say, you can't force  
22 a creative professional to celebrate marriages -- celebrate  
23 same-sex marriages. So, we see those kind of general  
24 principles.

25 Now that we see that the First Amendment kicks in

1 and strict scrutiny applies under the logic of these cases, I  
2 want to talk a little bit about how that plays out in the  
3 balancing of interest. And as I noted, Your Honor, the state  
4 might have a general compelling interest in play, but that's  
5 not the question. The question is, can they justify compelling  
6 Mr. Updegrove in this particular application?

7 In *Hurley*, the Court didn't say, well, let's look  
8 at the public accommodation generally and does it serve a  
9 compelling interest. The Court said, is there a compelling  
10 interest to regulate this parade.

11 And again, I'd note the Court to look at the  
12 *McManus versus Washington Post* [sic] case, the Fourth Circuit  
13 case. In that case, the Fourth Circuit in -- really analyzed  
14 the law that was compelling online platforms to publish ads.  
15 And in the -- even in intermediate scrutiny, the Court there  
16 didn't say, well, what's the compelling interest generally.  
17 The Court said, what's the compelling interest to apply this to  
18 the plaintiffs, which were the newspapers in that situation.

19 So the compelling interest analysis is fact  
20 specific to these plaintiffs. We're not seeking a facial  
21 challenge in our preliminary injunction motion, Your Honor. We  
22 are only seeking an as applied challenge to protect Mr.  
23 Updegrove.

24 And it goes back to the simple principles I noted  
25 before. Mr. Updegrove doesn't discriminate based on status.

1 He -- he chooses what messages he wants to speak, like in the  
2 *Hurley* case.

3 I think the principle would be similar, Your Honor,  
4 if you take a Muslim -- a calligrapher. That person might  
5 serve Christians generally, but he might have a general rule, I  
6 don't write the statement Jesus is Lord on a banner for  
7 anybody, no matter who asks me to do so.

8 Well, that's not status discrimination, Your Honor.  
9 That's just a speaker choosing what he or she wants to say.  
10 And that same type of logic applies perfectly here. It's a  
11 logic that was adopted in *Hurley*. *Hurley* said, look, in that  
12 situation the parade organizers allowed LGBT persons to walk in  
13 the parade, but they just couldn't celebrate a message they  
14 disagreed with, the banner that said gay, lesbian, bisexual  
15 organization of Boston, because it conveyed a message they  
16 disagreed with.

17 So, Your Honor, there's no interest, legitimate  
18 interest at least, under *Hurley* to actually apply this law to  
19 Mr. Updegrove to force him to speak a message he disagreed  
20 with. Secondarily, Your Honor, there are many other options  
21 the city has. We've put forth a lot of -- or the County -- or  
22 the Commonwealth has, excuse me. We've put forth those options  
23 in our brief.

24 And the Commonwealth comes back and says, look,  
25 they're not effective.

1                   But look at the *Billups* decision, Your Honor.  
2 *Billups* says under even intermediate scrutiny the government  
3 can't just say they're not effective. The government's burden  
4 is to provide actual evidence that they considered or tried  
5 those alternatives, and those alternatives are not effective.

6                   Your Honor, there is absolutely nothing in the  
7 record to suggest that, and *Billups* provides the guidelines to  
8 say, that fails the standard.

9                   Your Honor, so those are kind of my -- my major  
10 points. And I would like to note finally that in weighing  
11 these burdens this is a situation where the Commonwealth can  
12 have its cake and eat it too. Right? Because the Commonwealth  
13 can actually stop status discrimination in so many different  
14 applications all across the board, it can allow speakers to  
15 choose what they -- they want to say.

16                  The burden on a speaker, as the Supreme Court has  
17 recently said in cases like *Janus* and further back in *Hurley*  
18 and the *NIFLA* decision, that forcing someone to speak a message  
19 they disagreed with is always demeaning, the Court said, and  
20 that it, quote, violates a cardinal constitutional requirement,  
21 and in most circumstances would be universally condemned. And  
22 that's because if the First Amendment means anything, as the  
23 Court has said, it means that speakers get to choose what they  
24 want to say. That infringing on editorial control and  
25 editorial discretion strikes at the heart of the doctrine, and

1 the doctrine is to protect the individual freedom of mind and  
2 speaker autonomy.

3 And, Your Honor, the First Amendment says that  
4 speakers get to make that choice, not the government.

5 So, unless the Court has any questions for me, I  
6 will go ahead and sit down.

7 THE COURT: All right. Thank you.

8 MR. SCRUGGS: Thank you, Your Honor.

9 THE COURT: Do you want 30 seconds? I've heard a lot  
10 of argument here this morning, but go ahead if there's  
11 something you really want to tell me.

12 MS. SAMUELS: Thank you, Your Honor. I'll be very  
13 quick.

14 I just have three points in reaction to plaintiffs'  
15 arguments. The first is on the justiciability point, which is  
16 just to note that all of the reasons the plaintiff offers here  
17 for why the Court should take up this challenge and has  
18 jurisdiction are exactly the same as any other pre-enforcement  
19 challenge, so to accept those arguments would be to eviscerate  
20 the Article III limitations about what we look to when a law  
21 hasn't been enforced. And recent cases from the Supreme Court,  
22 like *SBA List*, which we think controls, shows that you have to  
23 have a credible threat of enforcement.

24 Plaintiff tries to replace the standard with older  
25 cases like *Mobil Oil* from 1991 and references to presumptions

1 about non-moribund statutes. But what that boils down to, Your  
2 Honor, is under plaintiffs' theory that a law is on the books  
3 at all would -- would invoke this Court's jurisdiction where  
4 it's never been enforced and where there's no harm, and so  
5 to -- to accept that standard again would be to completely gut  
6 this test that the Supreme Court laid out in *SBA List* and that  
7 the Fourth Circuit has continuously applied since.

8               One last point on justiciability, Your Honor, is  
9 that the publications clause point that plaintiff raises about  
10 the statements that Mr. Updegrove would like to post on his  
11 website, in the briefing plaintiff has conceded that the claims  
12 about what Mr. Updegrove may or may not post or say all  
13 collapses into the question of whether he can or cannot decline  
14 to photograph same-sex couples. Those -- those questions rise  
15 and fall together, and so the way this case has been argued,  
16 and also the constitutional merits of the question, those are  
17 linked, and so there's no reason to split that out for the  
18 justiciability analysis when -- when plaintiffs aren't even  
19 splitting that out on the merits.

20               I'll also, Your Honor, just make one -- one note  
21 on -- or three notes briefly on lines that plaintiffs blur in  
22 the doctrine that I think it's very important to keep separate.  
23 And the first is that line between speech and conduct.

24               Plaintiff here has spent a lot of time talking  
25 about the *Billups* case, but *Billups* was not an

1 anti-discrimination case and so we have to understand that is a  
2 speech case. But -- but this is an anti-discrimination case  
3 that of course affects speech principles, but -- but *Billups*  
4 does not control. Cases like *Jaycees* where we were looking at  
5 an anti-discrimination public accommodations law are -- are a  
6 better model.

7                   *Billups* is also helpful because it shows what this  
8 law does not do. What *Billups* did was went straight to the  
9 heart of an expressive activity, literally speaking on a public  
10 sidewalk giving a public tour. The law here says nothing about  
11 what the plaintiff must say. All it says is that when he  
12 chooses to enter commerce and when he chooses to photograph  
13 weddings, he cannot turn down couples seeking his services on  
14 the basis of protected characteristics.

15                  And that -- that distinction, Your Honor, between  
16 being a public accommodation and not is the other line that  
17 plaintiff blurs. All of these hypotheticals that -- that  
18 plaintiff offers if you zoom out and start with: Is this  
19 business a public accommodation, what service is being asked,  
20 and is that being provided to others, and why did this service  
21 get turned down. Those hypotheticals turn on different  
22 questions all along the way. And so to offer examples like a  
23 Muslim calligrapher, you need to look at: What is that  
24 service, who is asking for it, what is provided elsewhere, and  
25 why is it being denied. And so those hypotheticals collapse

1 all of these important questions onto each other.

2                 The last point I'll make on the expression point,  
3 Your Honor - and this is probably the most important one - is  
4 that all of plaintiff's argument assumes that the photographs  
5 he is taking on a commission basis of other couples' weddings  
6 are not his speech; they're not his message. And this point  
7 was dispositive in the *Rumsfeld v. FAIR* case because if all  
8 this came down to is when plaintiff opens his mouth the First  
9 Amendment insulates him from any government regulation, all of  
10 the other cases would have come out the same way. Cases  
11 like -- come out the other way.

12                 Cases like *Ward versus Rock Against Racism*. If all  
13 that mattered was that those concerts were speech, then that  
14 would be the end of it. And we know that that's not how that  
15 case turned out. It upheld a regulation, government regulation  
16 of expression.

17                 And so the question about whether it is plaintiff's  
18 message and whether it is his message he is conveying with his  
19 speech ignores the fact that he is holding himself out to the  
20 general public to take photographs of all number of people at  
21 all number of events at all number of weddings, and that is not  
22 his message. In the same way that the law schools in *FAIR* by  
23 being required to accommodate the military recruiters were not  
24 using their expression to convey their message about the -- the  
25 good or evil of military policy at the time.

1 I'll just wrap up, Your Honor - thank you for your  
2 patience this morning - by saying that the -- the interest at  
3 play here are, again, plaintiff would like to ignore that this  
4 is an anti-discrimination case. Of course speakers can choose  
5 what they want to say, but the government also can prohibit  
6 discrimination, the conduct of discriminating against somebody.  
7 Governments have done that for over a century, and the Court's  
8 decision here should be no different.

9 | Thank you.

10 | THE COURT: All right. Thank you.

I'm going to look at this a little further. I'll  
get you-all an answer as quickly as I can.

13 MS. SAMUELS: Thank you, Your Honor.

14 THE COURT: And we'll adjourn until Monday morning at  
15 9:30.

16 THE LAW CLERK: All rise.

17 (PROCEEDINGS CONCLUDED AT 10:47 A.M.)

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1 UNITED STATES DISTRICT COURT )

2 EASTERN DISTRICT OF VIRGINIA )

3

4 I, JULIE A. GOODWIN, Official Court Reporter for  
5 the United States District Court, Eastern District of Virginia,  
6 do hereby certify that the foregoing is a correct transcript  
7 from the record of proceedings in the above matter, to the best  
8 of my ability.

9 I further certify that I am neither counsel for,  
10 related to, nor employed by any of the parties to the action in  
11 which this proceeding was taken, and further that I am not  
12 financially nor otherwise interested in the outcome of the  
13 action.

14 Certified to by me this 3RD day of JUNE, 2021.

15

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17

18

/s/

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